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No. 686

IN THE

Supreme Court of the United States

October Term—1961

60 Civil Action No. 2067

MARÍA LUISA CRUZ de ORONA,
Petitioner-Appellant,
against
ANGELA ORONA, as Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,
Plaintiff-Respondent,
against
ISBRANDSTEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI FOR PETITIONER-APPELLANT AND APPENDIX

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Supreme Court of the United States

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Plaintiff-Respondent,

against

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Maria Luisa Cruz de Orona, general guardian of Maria Orona prays that a Writ of Certiorari issue to review an order and judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter which denied the right of the petitioner to intervene as a matter of right in a wrongful death action against defendants brought pursuant to the Jones Act and The Death On The High Seas Act.

The Opinions of the Courts Below

The Hon. John F. X. McGohey, United States District Judge for the Southern District of New York denied petitioner's leave to intervene as a matter of right pursuant to the intervention statute in this proceeding.

Thereafter, petitioner appealed to the United States Court of Appeals for the Second Circuit, which Court dismissed the appeal and rendered a decision upon the merits.

The opinions of the Courts below appear at Appendix "A".

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on October 23rd, 1961.

This cause was brought under the Jones Act, the Death On The High Seas Act and is within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

Question Presented

Is petitioner entitled to intervene as a matter of right upon the ground that there is a conflict of interest between the Estate's representative and petitioner, and that by reason thereof the petitioner's interest will not be adequately or properly represented by the estate representative?

Statement of the Case

Santiago Orona, deceased, was a seaman who suffered death on the high seas, leaving as survivors a dependent

infant and his mother, the petitioner herein, MARIA LUISA CRUZ de OROXA.

Petitioner herein brought an action in the United States District Court for the Southern District of New York, having petitioned the Public Administrator to appear as party plaintiff.

Thereafter, ANGELA OROXA moved for appointment as Administratrix of the Estate of the decedent, and was thereafter appointed and substituted as party plaintiff.

The right to recover damages in the case below depends upon the dependency of the survivors and the extent of their dependency upon decedent. The damages to be awarded will be determined proportionately.

The infant survivor is not the child of the Administratrix and therefore the present Administratrix would have no interest, familial or otherwise, to assure that the surviving dependent son obtains his full measure of damages in view of the fact that his recovery will impinge upon the amount that the Administratrix recovers. It is for this reason that the petitioner contends that there is a conflict of interest and the interest of the infant will not be adequately represented upon a trial of this action.

POINT I

The decisions below in denying intervention are violative of the purpose and intendment of the intervention statute, being Rule 21(a)(2) of the Rules of Civil Procedure.

The decedent had left him surviving a minor child, MARIA OROXA with MARIA LUISA CRUZ de OROXA being the General Guardian of the infant.

There is a conflict of interests between ANGELA ORONA and decedent's child.

"The measure of damages in a Jones Act Death Action, 46 U. S. C., 688, is the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased, * * *." *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622.

The outside limit of damages is measured of course by the earning capacity of the decedent for dependent survivors could never have reasonable expectation of pecuniary benefits exceeding the earning power of a decedent.

Thus, in the case at bar, whatever right to damages decedent's lawful, albeit non-recognized widow, ANGELA ORONA may have in a recovery by virtue of her right to have demanded support, assuming she had not disenfranchised herself of such right by virtue of her own acts, her recovery will be diminished by the amount to which decedent's minor son will be entitled to recover,

Seaboard Air Line Ry. v. Kenney, 240 U. S. 489;
Civil v. Waterman, 217 F. 2d 94.

It must be noted that the defendant may be able to prove a difficult marriage to minimize the damages to which the widow might be entitled, *Naylor v. Isthmian S. S. Co.*, 187 F. 2d 538, thus enhancing the monetary award to the infant and guardian.

It is readily apparent, that the widow in the instant case will be more interested in proving her pecuniary loss to the detriment of the loss sustained by decedent's surviving minor child.

The conflict of interest is real and it is apparent that the interests of the surviving minor child will not be protected without direct representation on his behalf.

POINT II

The Court erred in failing to permit intervention.

Having, it is respectfully submitted, conclusively shown the conflict of interest between the estate representative and decedent's son, it must be apparent that the right to intervene is the sole protection the infant has to recover his just measure of damages.

It may be well to say that the estate representative and her counsel are bound to protect the interests of the infant by reason of their fiduciary capacity, but though the obligation may exist in law, it does not exist in fact.

The infant or his guardian should not be relegated to the necessity of further proceedings in Surrogate's Court or direct civil action against the estate representative and/or counsel after the trial, should it be shown that the fiduciary obligation was not met.

The infant will of course be protected should intervention be allowed, and the defendant of course will not be prejudiced where all those claiming an interest in the decedent's estate are before the Court in one proceeding.

It must be noted at the outset that the only party who might be remotely aggrieved by intervention is the defendant.

Defendant, however, has stated through its counsel in an affidavit dated April 3rd, 1961, that:

> "The defendant does not oppose the motion now before the Court to add MARIA LUISA CRUZ de OBONA as a party plaintiff in this action. • • •"

The defense of proper party plaintiff is personal to the defendant and if defendant has no objection to appearance

in the suit by one who is a general guardian representing a surviving minor then certainly another party claiming an interest in the recovery cannot be and certainly should not be heard to complain, particularly where as here, there is a substantial conflict of interest.

Assuming *arguendo*, that the widow was duly appointed the estate representative, that fact is not determinative as to who may be entitled to recover pecuniary damages under the statute.

Whatever presumptions which may exist in favor of the estate representative *vis-a-vis* defendant, *Cleveland Tankers, Inc. v. Tierney*, 169 F. 2d 622, *Civil v. Waterman SS Corp.*, 217 F. 2d 94, such presumption is not conclusive as to the amount or proportion of recovery to which she may be entitled, where as here the decedent recognized his son as a dependent and never acknowledged his estranged widow as a dependent wife. Here the defendant on his tax returns filed 22 days after the purported marriage and filed two years later listed the son as a dependent and MARIA LUISA CRUZ de ORONA as wife and not ANGELA ORONA.

The infant's interest in a recovery should intervention be disallowed is or may be diminished by reason of the adverse interest of the estate representative and the infant will certainly be bound by a judgment in the action.

Rule 24(a) (2) of the Rules of Civil Procedure mandates in a case such as this the right of intervention, for,

> "Upon timely application anyone shall be permitted to intervene in an action * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *"

In *U. S. v. C. M. Lane Lifeboat Co., Inc. et al.*, 25 F. Supp. 411, intervention was allowed where petitioner alleged conflicting interest and inadequacy of representation.

The Court held, as this Court should, that, whether or not petitioner for intervention could in his own right maintain the action,

> "The rule in question like all the rules of Civil Practice should be liberally interpreted. The provision quoted would seem to apply in this case, for a judgment against the insurance company though it would not directly bind the petitioner, would in the last analysis do so indirectly. Then too, there is something to be said for the inadequacy of the representation of his interest * * *"

Professor Moore in his commentary 4 Moore P. 38, indicates also that intervention should be allowed,

> "if the representative has or represents some adverse to that of the petitioner * * *"

The issue in intervention is not who is to be a proper party plaintiff, but rather whether a party directly interested in the outcome of the proceeding should be allowed to participate directly where the proper party plaintiff has or may have conflicting interests.

That the Court below, did not properly interpret the intention of the intervenor rule is apparent by a reading of the order of April 17th, 1961, wherein the Court stated,

> "The motion is denied on the ground that under the Jones Act and the Death on the High Seas Act the only person authorized to bring the action is the Administratrix * * *"

The issue below as contended by petitioner was not based upon who had the right to maintain the action, but rather whether the guardian of an infant whose rights are adverse to the proper parties plaintiff would be prejudiced

by a denial of a right of participation by way of intervention.

In *Sloan v. Appalachin Electric Power Co.*, 27 F. Supp. 108 (D. C. S. D. W. Va. 1939) intervention was allowed to the employer's insurance carrier in an employees' third party personal injury action, the Court indicating that not only would intervention not prejudice the parties, but indeed there would be a just settlement of the controversy in a single proceeding.

See also:

Magee v. McNamy, 10 F. R. D. 5, (U. S. D. C. W. D. Penn.).

In *Kozak v. Wells*, 278 F. 2d 104 (C. A. 8th Cir.) it was held that the Court below erred in denying intervention as a matter of right where the three essential conditions had been met, namely, (278 F. 2d 104, 109)

(1) That the application be timely,

(2) That the representation of the applicant's interest by existing parties is or may be inadequate, and

(3) That the applicant is or may be bound by a judgment in the action.

There is no question but that in the case at bar the application was timely and that judgment will bind the infant claimant.

As to element two, the Court of Appeals ably and properly interpreted the statute by holding that,

> "a positive showing that such representation is inadequate is not necessary. The rule requires only that it may be inadequate * * *"

All of the elements required by Rule 24 (a) (2) exist in this case.

The estate representative and her counsel can make no showing as a matter of law or fact that intervention will be prejudicial to a just outcome of the cause and assessment of proper amount of damages.

It is to the benefit of all parties that all parties be before the Court.

CONCLUSION

For all of the foregoing reasons a Writ of Certiorari as prayed for should be granted.

Respectfully submitted,

MILTON GARBER,
Attorney for Petitioner.

Counsel:
KENNETH HELLER,
DONALD S. SHERWOOD.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2067.

ANGELA ORONA, as Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,

Plaintiff.

against

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,

Defendants.

MEMORANDUM AND ORDER.

McGOHEY, J.

This is a suit brought under both the Jones Act and the Death on the High Seas Act, for the wrongful death of one Santiago Orona which allegedly occurred upon a vessel of the Defendants on or about May 11, 1959. This suit was originally commenced on May 24, 1960 by the Public Administrator appointed by the New York County Surrogate upon the petition of one Maria Luisa Cruz de Orona, who though claiming to have been the common law wife of the deceased and the mother of his infant son Mario Orona, waived her right to appointment as Administratrix.

Thereafter the New York Surrogate revoked the appointment of the Public Administrator on March 10, 1961 and appointed Angela Orona as Administratrix, after a contested hearing upon the latter's petition, which alleged that she was the lawful widow of the deceased.

Appendix A.

Angela Orona thereafter moved to be substituted for the Public Administrator as plaintiff in this suit. This motion was granted by an order dated March 15, 1961, which also directed Kenneth Heller, Esq., who had appeared as attorney for the Public Administrator, to turn over the pleadings, memoranda and other documents in this action to Sidney Schmukler, Esq., the attorney for the present plaintiff.

That order has not been complied with pending decision on the instant motion of Kenneth Heller, Esq., on behalf of the common law widow to have the latter named as a plaintiff in the present action. The ground for this motion is that there is obviously hostility and conflict of interest between the present plaintiff on the one hand and the common law widow and her son on the other.

The motion is denied on the ground that under the Jones Act and the Death on the High Seas Act the only person authorized to bring the action is the Administratrix who sues for the benefit of the beneficiaries named under those statutes. See Civil v. Waterman Steamship Corporation, 2 Civ. 217 F. 2d. 94, 98.

The substitution necessitates further discovery proceeding by the defendants. They are given permission to do so on condition that these are completed by May 25, 1961.

The case is adjourned to the top of the Ready Calendar for June 5, 1961.

So ordered.

Dated: April 17, 1961.

JOHN F. X. McGOHEY,
U. S. D. J.

Appendix A.

ORDER.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House; the City of New York, on the twenty-third day of October, 1961.

Present:

HON. CHARLES E. CLARK,
" STERRY R. WATERMAN,
" LEONARD P. MOORE.

A motion having been made herein by counsel for the plaintiff to dismiss the appeal of MARIA LUISA CRUZ de ORONA,

Upon consideration thereof, it is

ORDERED that said motion be and it hereby is granted.

FURTHER ORDERED that the appeal from the order of the United States District Court for the Southern District of New York be and it hereby is dismissed.

S. A. DANIEL FUSARO,
Clerk.

Appendix A.

OPINION.

UNITED STATES COURT OF APPEALS.

SECOND CIRCUIT.

Motion to dismiss the appeal is granted for lack of merit in the appeal. The Administratrix is legally bound to pursue the claims of the deceased's infant son for pecuniary benefits his due, and to protect his rights as the surviving child of the deceased under 46 U. S. C. 688.

Oct. 23, 1961.

C. E. C.
S. R. W.
L. F. M.
U. S. C. J. J.

RULE 24 (a) (2) RULES OF CIVIL PROCEDURE

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . .

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Defendants-Respondents.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner does not append, as required by Rule 23(j), the judgments of the Court of Appeals and the District Court, which are sought to be reviewed.

Furthermore, this petition is not timely made. It was filed in this Court on January 26, 1962 and the order of the Court of Appeals was filed on October 23, 1961. Thus more than 90 days elapsed from the time of the filing of the order in the Court of Appeals to the time of filing of this petition.

STATUTES INVOLVED

In addition to statutes set forth in the Appendix to the petition at page 13, we note the following statutes.

Rule 17 (b) of the Federal Rules of Civil Procedure sets forth:

> "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. * * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. * * *"

Rule 24 (c) of the Federal Rules of Civil Procedure states:

> "Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene."

We also note Section 118 of the Surrogate's Court Act of the State of New York, which states:

> "Section 118. Who entitled to letters of administration. Administration in case of intestacy must be granted to the person entitled to take or share in the personal property, who are competent and will accept the same, in the following order: 1. To the surviving husband or wife. * * *"

STATEMENT

The facts are as stated in the memorandum and order of the Hon. John F. X. McGohey, more especially on pages 10

and 11 of the Appendix to the petition. The plaintiff-respondent notes the following additional facts. The petitioner-appellant did not oppose the substitution of the plaintiff-respondent, but thereafter made so many motions that were calculated to delay and impede the trial of this case which was at the head of the #3 Ready Calendar for almost eight months. The case has now been removed from said Calendar.

By motion returnable May 9, 1961 petitioner-appellant requested permission to reargue this order of April 17, 1961 and now for the first time asks to intervene. The moving papers consisted of a notice of motion, the affidavit of Kenneth Heller, Esq., the attorney for petitioner-appellant and a memorandum of law. No proposed pleading was annexed setting forth the claim or defense for which intervention was sought as is required by Rule 24(c) of the Federal Rules of Civil Procedure. An order dated May 16, 1961, denying said motion was made by the Hon. John F. X. McGohey, in which it is stated:

> "The present plaintiff is the duly appointed Administratrix. She is therefore 'bound as fiduciary to represent all and to prosecute the claims of all possible beneficiaries' as defined under both the Jones Act and the Death on the High Seas Act. Illegitimate children are included among such beneficiaries. Civil v. Waterman Steamship Co., 2 Cir. 217 F.2d 94. Moreover, there is no showing, other than wholly unsupported conclusory allegations, that the interests of the Administratrix are adverse to those of the infant or indeed of the movant, or that the Administratrix will not discharge her fiduciary duties faithfully. * * * The interests of the infant and the movant and even the latter's attorney are in all respects protected."

A proceeding brought in the U. S. Circuit Court of Appeals for the Second Circuit, by the petitioner-appellant to mandamus said Hon. John F. X. McGohey to grant the relief sought on the above motion was denied on May 24, 1961.

A notice of appeal was filed on June 13, 1961 on behalf of the petitioner-appellant in which she is described as follows, "the Guardian Ad Litem hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the final order of the Hon. John F. X. McGohey entered on May 16, 1961". No guardian ad litem has ever been appointed in this action. No notice of appeal has been filed by petitioner-appellant from the memorandum and order dated April 17, 1961 which is recited on pages 10 and 11 of the petition.

Petitioner-appellant's time to file her brief on appeal was extended by an ex parte order up to October 8, 1961 and no further extension of time has been granted or stipulated. Petitioner-appellant, by motion returnable to the United States Court of Appeals for the Second Circuit, applied for permission to file her brief on appeal in "*forma pauperis*" and this was denied. An application was then made for an extension of time for 30 days to file briefs on appeal and this was also denied. Plaintiff-respondent's motion to dismiss the appeal herein was granted on October 23, 1961 by said Court for lack of merit in the appeal.

THE COURT OF APPEALS WAS CORRECT

There was no basis in law or in fact to reach any other decision. The Court was cognizant of the countless delays to the trial of this action. Justice delayed is justice denied. The federal rule of civil procedure relating to intervention of right was not intended to enlarge upon jurisdiction of the federal district court (Fed. Rules of Civ. Proc. Rule 24(a); 28 U. S. C. A.; *Bantell* v. *McGrath*, 215 F. 2d 297).

Courts should be zealous to protect the rights of those who have sought their forum and not permit those rights to be delayed and deferred except in cases where present justiciable rights of other claimants are directly involved (*Kelley* v. *Pascal System, Inc.*, 183 F. Supp. 775).

THE WRIT SHOULD NOT BE GRANTED

There is nothing in this case, or in petitioner's argument, to bring it within this Court's established grounds for certiorari.

There is no alleged conflict with any decision of this Court or between the Court below and any other Court of Appeals. The fact that it is claimed certain isolated District Courts held to the contrary is surely not sufficient.

AS TO THE QUESTION PRESENTED

The Hon. John F. X. McGohey, who was cognizant of all the facts, made this finding in his order dated May 16, 1961:

> "Moreover, there is no showing, other than wholly unsupported conclusory allegations, that the interests of the Administratrix are adverse to those of the infant or indeed of the movant, or that the Administratrix will not discharge her fiduciary duties faithfully."

The plaintiff-respondent is represented by an attorney admitted to practice before this Court. The Court must assume that the Administratrix will carry out her sworn duty and that her attorney will carry out his sworn duty as an attorney admitted to practice in this Court.

No statute confirms an unconditional right to intervene (*Basle Theatres, Inc.* v. *Warner Bros. Pictures Distributing Corp.*, 24 F. R. D. 476). The right to intervene presupposes existence of action brought by proper plaintiff (*American*

Trucking Ass'ns, Inc. v. U. S., 170 F. Supp. 38, 4 L. Ed. 2d 53). The term "intervention", connotes admission by court's leave, of person, who was not an original party to pending legal proceedings, as a party thereto, for protection of right or interest alleged by him to be affected by such proceeding (*American Bowling Supply Co. v. Al Martin, Inc.*, 96 F. Supp. 35; *Magee v. McNany*, 10 F. R. D. 5).

The question also arises whether the motion for intervention was timely and if the proper procedure for intervention was complied with. The question whether an application for permission to intervene is timely filed must be determined by an exercise of discretion of district court, in view of fact that federal rules regarding intervention require timely application, but are silent regarding what constitutes timely application (Fed. Rules of Civil Proc. Rule 24; 28 U. S. C. A.; *Mullins v. De Soto Securities Co.*, 2 F. R. D. 502, appeal dismissed 136 F. 2d 55). There has been no showing of abuse of discretion in this case, as the application to mandamus Judge McGohey was denied. The *Mullins* case, *supra*, also held:

> "Under federal rule permitting intervention of right when representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action, an application to intervene was defective, where unaccompanied by a proposed pleading. Fed. Rules of Civ Proc. Rule 24 (a) (c)."

The intervention rule was not intended to permit persons who are already before the court to file additional petitions in which they claim certain statutory or common-law rights (Fed. Rules of Civ. Proc. Rule 24; 28 U. S. C. A.; *U. S. A. for the Use of Ward Const. Service, Inc. v. U. S. Fidelity & Guaranty Co.*, 26 F. R. D. 568). The application herein for intervention was not timely, did not comply with the procedural requirements, and there was an express waiver by

the petitioner-appellant when she petitioned for the appointment of the Public Administrator to act as Administrator of the estate of the decedent and as the former plaintiff in this action.

"Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention" (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324, 56 S. Ct. 466, 472; 80 L. Ed. 688; *Barnard v. McGrath*, *supra*). Certainly Rule 24(a) F. R. C. P. does not grant the right of intervention to try an issue outside the scope of the § 17 proceedings, for it was not intended to enlarge upon the jurisdiction of the court (*Basle Theatres*, *supra*).

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

SIDNEY SCHMUCKLER,
Attorney for Plaintiff-Respondent.

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Defendants-Respondents.

DEFENDANTS-RESPONDENTS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1961.

No. 686.

MARIA LUISA CRUZ DE ORONA,

Petitioner-Appellant,

against

ANGELA ORONA, As Administratrix *de bonis non* of the Estate of Santiago Orona, deceased,

Plaintiff-Respondent,

against

ISBRANDTSEN COMPANY, INC., UNITED MAIL STEAMSHIP COMPANY,

Defendants-Respondents.

DEFENDANTS-RESPONDENTS' BRIEF.

Statement.

The defendants-respondents believe that there is a question of adequacy of representation of the parties to the lawsuit. This action was instituted on May 24, 1960 by the Public Administrator of the Estate of Santiago Orona, deceased. Thereafter, Angela Orona, as Administratrix, was substituted as party plaintiff. The amended complaint seeks recovery for the death of a seaman who was employed aboard the defendants' vessel. The action was brought under the Jones Act, Title 46 U. S. C. 688,

and the Death on the High Seas Act, Title 46 U. S. C. A. 761. The amended complaint alleged as survivors: a widow, Angela Orona, a son, upon information and belief, Mario Orona, a mother, Carmen Orona, and a sister, Carmen Orona Acevedo. In the examination before trial of the plaintiff, Angela Orona, and in the answers of Angela Orona to interrogatories propounded by the defendants, she claims that she has no knowledge of support given to the child, Mario Orona, the mother, Carmen Orona, and the sister, Carmen Orona Acevedo, of the decedent.

POINT I.

The Administratrix must represent all claimants under the statutes.

Under the Jones Act and the Death on the High Seas Act, only the representative of the decedent may bring an action. *Reading Co.* v. *Koons*, 271 U. S. 58 (1926); *O'Neill* v. *Cunard White Star, Ltd.*, 69 F. Supp. 943 (S. D. N. Y. 1946), affirmed, 160 F. 2d 446 (2 Cir.), cert. denied, 332 U. S. 773 (1947). The Administratrix owes a duty of absolute loyalty to and impartiality with regard to all beneficiaries. *In Re Redfern's Will*, 109 N. Y. Supp. 2d 74.

POINT II.

Amounts and apportionment of recovery must be determined by the court at the trial.

The Death on the High Seas Statute, 46 U. S. C. A. 761, specifically provides in 762 as follows:

> "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained

> by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."

While there is no express language in the Jones Act or The Federal Employers' Liability Act regarding the allocation or apportionment of damages, it is not unusual at the trial for the fact-finding instrumentality, be it jury or court, to apportion the damages to each party entitled thereto in a Jones Act case. *In Re Southern Steamship Company's Petition*, 135 F. S. 358.

POINT III.

The Administratrix is unable to meet her legal obligation.

Since the Administratrix is unable to present evidence as to pecuniary loss to the infant son, the child will not be afforded adequate representation.

Permission to permit participation at the trial of the attorney for the infant's guardian is not unprecedented. In the case of *Sgrille v. Waterman S. S. Corporation*, 84 F. S. 718, the District Court permitted both the wife and the mother of the illegitimate child to be represented by counsel. The court recognized the antagonism between the legal wife and the mother of an illegitimate child. On appeal, the propriety of this action was reviewed by the United States Court of Appeals for the Second Circuit in *Civil (Sgrille) v. Waterman Steamship Corp.*, 217 F. 2d 94, at page 98. The court questioned the correctness of the decision, but found no error in this regard which would

prejudice the respondent. The court held that it would be a positive advantage to it to have all interests clearly represented and taken care of in one action.

Conclusion.

The petition for *certiorari* should be granted.

Respectfully submitted,

DANIEL FLYNN,
Attorney for Defendants-Respondents.

Of Counsel
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